

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Complaint on Post E.C.S.)

FILED
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Docket No. C99-1

**ANSWER OF INTERVENOR CAUUC IN OPPOSITION
TO MOTION OF US POSTAL SERVICE TO DISMISS COMPLAINT**

(DECEMBER 15, 1998)

STATEMENT OF THE CASE

A Complaint was filed by the United Parcel Service ("UPS") on October 6, 1998, with the Postal Rate Commission ("Commission") regarding a new postal service recently inaugurated by the U.S. Postal Service ("Postal Service"). That postal service is demarked as Post ECS, a service by which the Postal Service provides document delivery over the Internet for a fee. The Postal Service further intends to combine this with an Electronic Postmark System to combine the service with a time and date stamp. The Postal Service promotes this as a substitute for Postal Service and other courier services.

The Postal Service has initiated this new postal service without requesting a recommended decision from the Commission and now moves the Commission to dismiss the above captioned complaint. The Postal Service denies that the Commission has jurisdiction over this service, over a decision as to whether the Post ECS is a postal service, and further states that Post ECS is not a postal service. By this pleading, Intervenor Coalition Against Unfair USPS Competition ("CAUUC") opposes this motion to dismiss,

THE COMMISSION HAS THE AUTHORITY AND DUTY TO DETERMINE
WHETHER POST ECS IS A POSTAL SERVICE AND THE COMMISSION'S
JURISDICTION THERE TO

The Postal Service rejects the Commission's authority to determine its own jurisdiction and states, in effect, that the Postal Service's decision on what is a postal service is binding upon the Commission. The Postal Service states "there is nothing in the language of section 3662 which suggests any intent on the part of the Congress to grant the Commission the authority to declare independent actions of the Postal Service to be either lawful or unlawful... If this matter is reviewable, a United States district court is the appropriate forum..." Postal Service Motion to Dismiss, p. 3. The Postal Service attempts to buttress its argument by historical reference to litigation shortly following the passage of the Postal Reorganization Act of 1970. Postal Service Motion to Dismiss, p.4, fn2

The Postal Service is wrong. The Commission is directly delegated the issue of determining what matters are or are not postal services and subject to the jurisdiction of the Commission. The fundamental jurisdiction of the Commission is clearly delineated by the statute at 39 U.S.C. § 3662. The section is entitled "**Rate and service complaints**" and states as follows:

Interested parties who believe the Postal Service is charging rates which do not conform to the policies set out in this title or who believe that they are not receiving postal service in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission...If the Commission, in a matter covered by subchapter II of this chapter, determines the complaint to be justified, it shall after proceedings in conformity with Section 3624 of this title, issue a recommended decision which shall be acted upon in accordance with the provisions of section 3625 of this title and subject to review in accordance with the provisions of section 3628 of this title..." 36 U.S.C. § 3662.

A plain reading of this portion of the statute makes it clear that the Act specifically contemplated complaints regarding improper offering of a postal service and the rates under which such a postal service is being offered by the Postal Service. The section is entitled “Rate and service complaints”, clearly indicating that the rates of a postal service are contemplated. The language quoted above provides as follows:

1. Interested parties - UPS and/or intervenor CAUUC
2. Believing improper rates being charged - alleged in the complaint
3. May file a complaint - as done by UPS/CAUUC
4. If covered by Subchapter II - rate and classification of mail
5. PRC shall issue a Recommended Decision--under sections 3624, 3625, 3628

What is the conclusion to be drawn here? Congress clearly intended that the complaint process deal with ratemaking. It specifically referred to complaints under Subchapter II. Since all requests for recommended decisions submitted by the Postal Service are automatically subject to Subchapter II proceedings, what kind of “rate complaints” could it have contemplated? While a number could come to mind, at least one of these would be a complaint alleging that a postal service is being offered without having first been subject to a Subchapter II rate and classification proceeding’.

The Postal Service attempts to mischaracterize the Commission’s authority on such a case by limiting the Commission’s authority only to a rate case for “rates being charged, presumably in accord with previous action by the Commission and the Governors for **existing** postal services. (Emphasis added). Motion to Dismiss, p. 2. In

¹ Other such complaints might also be the Postal Service unilaterally changing a rate without submitting it to the Commission or a rate which is being offered at below cost because of changing costs even though the rate was once subject to a Subchapter II proceeding.

other words, the Postal Service believes it controls the Commission's rate and classification agenda by what it chooses to submit to the Commission. "Speak only when spoken to" is the Postal Service theory. The Commission, according to the Postal Service, lacks any independent authority to consider a "rate complaint" on a postal service which has not been previously submitted by the Postal Service to the Commission.

This theory turns the complaint process on its head. Under the Postal Service theory, a rate complaint could lie for a postal service which has already been subject to a Subchapter II proceeding, but not for a postal service which has never been submitted for a rate. The Commission has already found that the Postal Service has initiated a postal service without having submitted it for a Commission recommended decision. Declaratory Order No. 1145, C96-1, p. 25. In that decision, the Pack & Send case filed in 1996 by CAUUC, the Commission found that a packaging service initiated by the Postal Service was indeed a postal service and had not been subject any rate or classification proceeding because the Postal Service had failed to so submit'.

The Postal Service's action in the packaging cases cited above belies its legal position. The Postal Service and Board of Governors ("Governors") do understand that the Commission has a role in the issue of jurisdiction. The statute makes this clear as

The Postal Service will undoubtedly cite the subsequent Governors Decision in the Pack N Send case by which the Commission's power to make such a decision was rejected. Decisions of Governors, C-96-1, April 8, 1997. Nevertheless, The Postal Service did ultimately submit its packaging service to the Commission. A recommended decision is currently pending before the Governors. Provisional Packaging Service, MC97-5, Recommended Decision, March 31, 1998.

do the actions rather than the legal theories of the Postal Service and the Governors.

The Postal Service further opposes action on this complaint by erroneously comparing this complaint to one involving a Postal Service rule from the Domestic Mail Manual. However, that case embodied in Order No. 724 is clearly distinguishable. As the Commission itself stated, this case involved a “Postal Service rule, purportedly issued under its independent administrative powers.” Order No. 724. This is not such a rule. It is a “rate complaint” specifically provided for in the statute.

It is absolutely critical that the Commission exercise its statutory duty and authority in this and similar cases. If the Commission were not to exercise its jurisdiction, the Postal Service’s wish that its judgment can only be questioned by filing a lawsuit in Federal district court would be realized. The Congress clearly understood the need for a citizen initiated complaint process at the Commission and provided it in section 3662.

**POST ECS IS A POSTAL SERVICE AND IS SUBJECT TO
THE JURISDICTION OF THE COMMISSION**

The Postal Service continues its quest to avoid Commission oversight by mischaracterizing the Commission’s jurisdiction and the nature of the product to be considered, Post ECS. Fundamentally, this product is not different from the currently jurisdictional Mailing Online service except that no printer located inside a contract or postal facility is utilized. The Postal Service freely admits that Mailing Online is a postal service and has submitted it to the Commission for jurisdiction. Why then does the Postal Service attempt to avoid jurisdiction here?

The answer is not clear, but the implications are potentially enormous. In Mailing Online, a mail message is sent by the Postal Service to a postal facility where it is printed and then delivered to the recipient. The Postal Service acknowledges that this is e-mail and has submitted the new service for a recommended decision. Mailing Online Service, MC98-1.

In the Post ECS example, the same e-mail message can and will be sent to the same recipient, but because there is no hardcopy delivery, the Postal Service maintains this service to be nonjurisdictional. As the Postal Service states: it is not a postal service “in ordinary parlance”. Rather it is a totally electronic service. Customers of Postal ECS make no use of the mail services traditionally offered by the Postal Service such as collection, processing, handling, transportation, and delivery functions maintained and operated by the Postal Service”. Motion to Dismiss at 14

This statement is both staggering in its breadth and implication. It is also unsupported by the evidence before the Commission. There are no facts to support this assertion. If none of the Postal Services basic functions are utilized, then how is the Post ECS service collected, accepted, processed, handled, transported, and delivered? Which Postal Service employees are involved in the management and implementation of this service? How is the fee collected and allocated to Postal Service cost accounting? Most importantly of all, what is the implication for the traditional mail of which the Postal Service claims this is not a part? In other words, is Post ECS to be a major part of the future of mail delivery for the Postal Service potentially generating billions of dollars of revenue all of which will not be subject to Commission jurisdiction? If so, how much current “jurisdictional” revenue will be

diverted from “traditional” mail to non-jurisdictional Post ECS? What is the impact of this diversion/bypass on universal service?

None of these questions can be answered because the Commission has no evidence before it to answer these questions. It has only the bald assertion of the Motion to Dismiss that this service is not jurisdictional. This service must be subject to jurisdiction by the Commission because there are so many unanswered questions and because the current position of the Postal Service is in contrast and conflict with the traditional Postal Service position on electronic mail and Commission jurisdiction,

The Postal Service has not until now resisted Commission jurisdiction over mail matter sent over the Internet. The Mailing Online Proceeding is the prime example, but a series of policy statements by Postal Service officials and the General Accounting Office also buttress this point.

Most recently, the Postmaster General stated that the Postal Service’s activities over the Internet are subject to Commission regulation. At a recent CATO Institute postal forum, PMG Henderson stated as follows:

I don’t think the challenges of the Internet are any different for the Postal Service than they are for any organization in America...Thus far what we’ve tried to do with the Internet is **try to provide access to the Postal Service**...There is an interesting theory that has been proposed to us about would the Postal Service be interested in connecting the e-mail address to a physical address...that creating a highway through which some secure, secure by virtue of being able to enforce through the inspection service....Janet Reno has delegated to our inspection services some regulatory authority for looking at the fraud laws around electronic commerce and electronic transmissions...one model is to have a private company own the access(to the Internet) itself...There another model that says everybody builds their highway...given those two approaches which are both fairly unreasonable, folks have come to us and said would you do it?(manage the Internet) Here’s why we want **you** do it. **Number one**

you're regulated by the PRC. (Emphasis added). Remarks of Postmaster General William Henderson: Mail @ the Millentium at CATO Postal Forum, December 2, 1998. Transcript attached, Tape submitted as Library Reference CAUUC-1. Tape obtained from CATO Internet Site (www.CATO.org).

The Postmaster General clearly understands that electronic, mail, and regulation of the internet by the Postal Service is jurisdictional. This position is consistent with other statements in other venues other than this Commission:

1. Description of Post Electronic Commere Services equating electronic correspondence with First Class Mail - 61 Fed. Register 42219 (8/14/98)
2. Postal Service testimony in Mailing Online proceeding stating that in my mind, I think of (electronic data) as mail pieces. Docket No MC 98-I ,Tr. 7/17/98.
3. General Accounting Office Report on New Postal Products stating that the **Postal service views its entry into the electronic commerce market as an extension of its core business -the delivery of traditional mail** GAO/GGD-99-15, (Nov.24, 1998) at 36-37.
4. Postal Service advertising that Post ECS is a substitute for traditional overnight and courier services - Complaint Exhibit A.

The Postal Services legal assertion that Post ECS is not very closely related to the delivery of mail is not supported by any evidence in the record. The Postal Service provides no factual information on this point. The Postal Service states that the service is a completely unbundled electronic service. What facts are submitted to support this assertion? Even if this were the case, this does not make the service ancillary to the carriage of mail. As stated above, the act of electronic delivery by the Postal Service makes it mail

What is cited above, from the Postmaster General's remarks to the GAO Report, is the Postal Service equating this new unsubmitted electronic mail and postal service as mail in every forum except the Commission because only the Commission has any regulatory authority over the Postal Service.

CONCLUSION

the Motion to Dismiss must be denied. This Service is jurisdictional. It is a postal service and the Commission must approve a recommended decision before it can be offered to the general public. Therefore, intervenor Complainant CAUUC respectfully urges the Commission to deny the motion to dismiss and to hear the complaint in the above captioned case under its authority in Section 3662,

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steve Silver", is written over a horizontal line.

Steve Silver
Attorney for Intervenor Complainant
Coalition Against Unfair USPS Competition

EXHIBIT A

Question Asked by Mike Spencer, Global USA

“Mr. Postmaster General, would you like to comment on the opportunities and challenges that the Postal Service (*unintelligible*) via the Internet’?”

ANSWER:

“I don’t think the challenges of the Internet are any different for the Postal Service than they are for any organization in America. I mean, everybody is trying to figure out what to do with the Internet besides get naked and do something (*unintelligible*). I mean, that’s really the only web site people want to watch. In effect, you are trying to figure out where you relate to the Internet. Thus far, what we’ve tried to do with the Internet is try to provide access to the Postal Service which that’s a no-brainer. I mean everybody’s doing that - so you can get labels. There is an interesting theory that has been proposed to us about would the Postal Service be interested in connecting the e-mail address to a physical address (*unintelligible*) that creating a highway through which some secure, secure by virtue of being able to enforce through the inspection service. as many of you know, Janet Reno has delegated to our inspection service some regulatory authority for looking at the fraud laws around electronic commerce and electronic transmissions and the way its been postured to us is you know there is two models in America for having these avenues. One model is to have a private company own the access itself - that’s a Microsoft model - where you have economic monopoly. And that has not proven to be reasonable for the competitors because then you can raise tariffs on this highway and ATMs are an example of that. ATMs are introduced all over very modestly they were \$0.50 now its a dollar and a half unless I use my banks ATM and there’s nothing I can do about that. I mean, my choice is to withdraw using the ATM and that’s not acceptable to me. I’d rather use the ATM. pay two and a half then stand in line for a teller. So, there’s that model of private sector coming in. There’s another model over here that says everybody builds their highway, everybody builds their infrastructure. That’s the cellular phone model and that really suboptimizes. Cellular phones in this country are far worse than they are anywhere else in the world because everybody’s building their own little network. And given those two approaches which are both fairly unreasonable, folks have come to us and said would you do it? Here’s why we want you to do it. Number one, you’re regulated by the PRC. We have access to you. We know that you just can’t go in there and go from \$0.50 to \$2.50 without reason. Number two, you can’t have unreasonable policies because you have oversight and you’re a quasi - or you’re not quasi - you are a government entity. So they said, would you be the trusted third party? So that’s something that we are exploring with several companies in the private sector. And keep in mind that we have built this infrastructure that’s there today for operating reasons. In other words, we’re interconnected nationally with this huge electronic highway basically to run the Postal Service and if you remember I talked about an information platform that: (a) would have activity based accountings and limited price rate; you have customer value you could go in and talk to your mail and the third perk would be that it would enable you to cut cost. Cutting costs is a very high priority. When you’re running an monopoly, one of the things you gotta do is be very worried about your costs. That infrastructure is done. Whether we as a public policy or a public service point of view want to have anyone ride on it is another question, but we have the electronic ubiquity that no one else has today. ‘Cause we can get you as close geographically to a home as is possible and that’s your Post Office. And maybe the private sector partners and (*unintelligible*). But that’s the thinking of the Internet.

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The WTO's Shrimp-Turtle Decision: Free Trade vs. the Environment (12/08/98)

A Cato policy forum featuring **John H. Jackson**, Georgetown University Law Center. **Steven Charnovitz**, Global Environment & Trade Study, **David Schorr**, World Wildlife Fund, and **Kanthi Tripathi**, Minister of Commerce, Embassy of India. On October 12, the Appellate Body of the World Trade Organization upheld a U.S. law designed to protect sea turtles endangered by shrimp fishing but faulted the United States on how the law was being administered. Although it was immediately condemned by environmental groups, the decision has been hailed by some observers as an important affirmation of the right of nations to pursue conservation measures. Does the WTO decision block the pursuit of legitimate environmental goals, or is it merely a signal that environmental policies must be carefully crafted to avoid arbitrary discrimination and unnecessary trade restriction?

The Morality of Social Security Privatization (12/07/98)

A Cato Policy forum featuring **Daniel Shapiro**, West Virginia University, **Charles Murray**, American Enterprise Institute, **Kenneth Tollett**, Howard University, and **Amitai Ekioni**, George Washington University. The ultimate question in the debate over Social Security privatization is a moral and philosophical one. Privatization would not be justifiable if it were economically beneficial but morally suspect. A panel of leading philosophers and social scientists will debate the moral implications of Social Security reform, including issues of fairness, liberty, community, and justice.

Mail @ the Millennium: The Future of Private Postal Service (12/02/98)

The communications revolution and private package and overnight delivery services have put pressure on the USPS to improve service and hold down costs. These tasks are frustrated by high labor costs and problems with the nearly 900,000 mostly unionized workers. To generate more revenue the Postal Service has offered new products from coffee mugs to phone cards. More ominously, it is trying to increase its role in cyberspace. The private sector wants to restrict such unfair competition from a tax-exempt government agency. This conference will examine the nature of the Postal Services' problems, how that monopoly might be unwound, and the current proposals to facilitate a world-class communications and mail delivery system for the 21st century.

China in the New Millenium: Market Reforms and Social Development

(11/20/98) A Cato Book Forum featuring **Mao Yushi**, Unirule Institute of Economics, Beijing, with comments by the editor **James A. Dorn**, Vice President for Academic Affairs, Cato Institute. This event celebrates the Cato Institute's release of [China in the New Millennium: Market Reforms and social Development](#). Most people realize that a market economy fosters wealth creation, but they often fail to perceive how the spontaneous market process promotes freedom. Since 1978, China's economic liberalization and opening to the outside world have increased prosperity and advanced civil society. However, the lack of a true market economy--which depends on the rule of law and private property--means that the future of China's market system is unclear.

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused to be served the foregoing document by first class mail, postage prepaid, in accordance with Section 12 of the Rules of Practice.

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A handwritten signature in black ink, appearing to read "S. W. Silver", written over a horizontal line.

Steven W. Silver

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